UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
_______________________________________X
MARIO REYES,

Plaintiff,

-against-

11-CV-7084 (AT)(GWG)

THE CITY OF NEW YORK, DETECTIVE MARTIN CAMPOS, Shield #00176, DETECTIVE VICTOR CARDONA, Shield #00446, SERGEANT BRIAN MCALLISTER, Shield #3940, DETECTIVE RAYMOND ABREU, Shield #29825, DETECTIVE CONNOR PASCALE, Shield #7527, DETECTIVE SALVADOR TORO, Shield #2206, and DETECTIVE JOHN TALAVERA, Shield #7085,

Defendants,
_______________________________________X

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiff initiated the current action to pursuant to 42 U.S.C. § 1983 to seek redress under the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution for violations of his innate rights to be free from excessive force, malicious prosecution, and unreasonable searches and seizures. Plaintiff respectfully submits this memorandum of law in opposition to Defendants' motion for partial summary judgment, pursuant to Fed. R. Civ. P. 56.

STANDARD OF REVIEW

"Summary judgment is a drastic remedy which should be granted only when it is clear that the requirements of Fed. R. Civ. P. 56 have been satisfied." United States v. Bosurgi, 530 F.2d 1105, 1110 (2d Cir. 1976). Pursuant to Fed. R. Civ. P. 56, summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the facts must be interpreted in the light most favorable to the non-moving party. Id. at 255 (citation omitted). As a result, the reviewing court must accept as true the factual statements in the opposing party's affidavits, and draw all permissible inferences in the nonmovant's favor. Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2d Cir. 1980). In addition, any factual doubts are resolved in favor of the nonmovant. American Mfrs. Mutual Ins. Co. v. American Broadcasting-Paramount Theaters, Inc., 388 F.2d 272 (2d Cir. 1967).

FACTS

On April 11, 2013 at approximately 12:30 P.M. at or near the corner of 117th Street and Park Avenue, New York, NY, plaintiff Mario Reyes was stopped by New York City Police officers. (Campos Dep. 25:21-26:1-16). The facts regarding the stop and subsequent arrest of plaintiff are all disputed, and there are multiple accounts of the incident.

Detective Campos testified that the only basis for stopping plaintiff was a call over the radio from Detective Cardona that a male Hispanic was smoking PCP. (Campos Dep. 24:2-12; 26:17-27:1). However, Detective Campos does not recall whether he observed plaintiff smoking anything. (Campos Dep. 24:17-19). Detective Cardona, who put the call on the radio, testified that the only thing that caught his attention was the fact that plaintiff was allegedly rolling a cigarette – that he "could see him putting something into a marijuana cigarette or a blunt [...] or the packaging." (Cardona Dep. 28:22-25; 29:17-20). Cardona admitted that he could not see if there was tobacco in the cigarette, and that as he was sitting in the vehicle he could not tell if plaintiff actually had PCP. (Cardona Dep. 30:9-13; 31:8-13). Furthermore, no PCP, marijuana or cigarette was recovered at the scene. (Campos Dep. 35:20-21; 36:19-22; McAllister Dep. 17:12-17). Plaintiff denies smoking marijuana or PCP on the date of the incident. (Reyes Dep. 47:3-4; 95:12-14; 124:7-12).

According to Detective Campos, when he approached Plaintiff, he said "Stop. Police. Stop." or words to that effect. (Campos Dep. 25:21-26:1-16, 34:5-18). Detective Campos testified that he did not say anything else besides identifying himself and saying stop. (Campos Dep. 26:10-16, 27:16-24, 33:7-11). Campos testified that "after I identified myself and he just looked at me [...] [t]here was no other discussion." (Campos Dep. 33:7-11). According to

Campos, after he ordered Reyes to stop and identified himself, "[Reyes] did stop." (Campos Dep., 34:11-18; 26:1-25, 27:1-10; 28:7-11).

Sergeant McAllister testified that both he and Detective Campos had their badges out when they approached Plaintiff. (McAllister Dep. 19:9-10). He also claims that as soon as he and Detective Campos approached Plaintiff, Plaintiff "reached into his back, like in his back, his buttock area and then he just, I guess, however he pulled his hands up and just dove down towards us, towards the ground. [sic]" (McAllister Dep. 20:16:21).

Plaintiff testified that he took two bags of heroin out of his jacket pocket with his right hand, at which point Detective Campos hit Plaintiff's right hand, knocking the bags to the ground. (Reyes Dep. 61:2-25, 62:1-21). Detective Campos testified that Plaintiff reached into his pocket, attempted to swallow heroin, and charged at Detective Campos. (Campos Dep. 27:18-24). Sergeant McAllister observed only that "whatever he had in his hand, he was putting it up to his mouth." (McAllister Dep. 22:19-20).

Thereafter, plaintiff was handcuffed and transported to the 25th Precinct Hub Site. (McAllister Dep. 29:20-31:4; Abreu Dep. 35:4-13). At the precinct, plaintiff was strip searched and assaulted by officers inside a cell. (Reyes Dep. 102:7-103:3). Plaintiff requested medical attention and was transported by Detectives Pascale and Abreu to Bellevue Hospital to be treated for his injuries. (Reyes Dep. 116:1-8, 118:21-119:10; Pascale Dep. 14:12-15:16; Abreu Dep. 20:8-12). X-rays at Bellevue Hospital revealed a coronoid process fracture. (See Bellevue Hospital medical records, Ex. Y).

After being discharged from the hospital, plaintiff was eventually arraigned and charged with tampering with evidence, assault in the second degree, resisting arrest, and criminal possession of a controlled substance in the seventh degree. (Reyes Dep. 132:2-20; Def.'s Ex. M).

Plaintiff was then transferred to Rikers Island. (Reyes Dep. 132:19-20). At Rikers Island, plaintiff received additional treatment for his injuries, including his elbow fracture and multiple rib fractures. (See NYC Correctional Health Services medical records, Exhibit Z). On or about June 9, 2011, plaintiff plead guilty to a misdemeanor charge of criminal possession of a controlled substance in the seventh degree, received a sentence of time served, and was released from custody. (Def.'s Ex. N).

ARGUMENT

I. THERE ARE MATERIAL ISSUES OF FACT AS TO WHEN PLAINTIFF WAS SEIZED.

Defendants claim that they should be granted summary judgment on the unlawful seizure claim because plaintiff was not effectively seized until there was probable cause to arrest him. (See Defendant's Memorandum of Law in Support of their Motion for Partial Summary Judgment ("Def.'s Memo"), p. 3). However, there are material issues of fact regarding when Plaintiff was effectively seized such that summary judgment is inappropriate at this stage. There are three distinct versions of the events leading to Plaintiff's arrest. When, as here, almost all of the facts are in dispute, summary judgment should be denied.

It is undisputed that, while plaintiff was eventually arrested for possession of heroin, defendants did not initially stop plaintiff because they suspected was possessing heroin. Rather, the only explanation offered for the initial stop was a disputed observation that plaintiff was smoking marijuana or PCP. (Campos Dep. 24:2-12; 26:17-27:1). There are further material disputes about if and when the arresting officers ever observed the heroin glassines. (Reyes Dep. 61:2-62:21; Campos Dep. 27:18-24; McAllister Dep. 22:19-20). In a case such as this, where the accounts of the event vary wildly, it cannot be determined as a matter of law whether or not plaintiff was seized prior to there being probable cause to arrest.

In addition, under Detective Campos' version of the events, Plaintiff was seized prior to Defendants having probable cause for his arrest. The test for when a seizure occurs is whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554 (1980). Defendants claim that prior to the physical struggle, "Reyes had every right to ignore [Det. Campos'] inquiry and continue walking." However, according to Campos, he explicitly ordered Plaintiff to stop and identified himself as a police officer. (Campos Dep. 25:21-25, 26:1-16, 34:5-18). A reasonable person would not feel free to leave if an officer identifies himself as police, and orders the individual to stop. As one Court in the Southern District recently observed, "it is difficult to imagine many contexts in which an officer shouting [stop, police], followed by the person stopping, would *not* constitute a *Terry* stop [...] [i]f the 'reasonable person' of Fourth Amendment law would feel free to disregard an officer yelling 'STOP, POLICE!!!' and go about his business, then this 'reasonable person' bears little or no resemblance to the many reasonable people who have been or will be affected by the NYPD's stop and frisk practices." Ligon v. City of New York, 2013 U.S. Dist. LEXIS 22383, at *151-152 (S.D.N.Y. Feb. 14, 2013). See also United States v. Simmons, 560 F.3d 98 (2d Cir. 2009) (holding that a stop took place where an officer twice ordered a person to "hold on a second," and after the second order the person stopped); Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. N.Y. 2000) (stop occurred where an officer pointing a spotlight at a person said, "What, are you stupid? Come here. I want to talk to you," and then told the person to show his hands)

Therefore, under Detective Campos' version of the events, Plaintiff was clearly seized for Fourth Amendment purposes when Detective Campos stated "Stop, Police," prior to Plaintiff reaching into his coat. Because there are issues of fact as to what occurred prior to Plaintiff's arrest, and, under Detective Campos' version of the events, Plaintiff was seized prior to there being probable cause for his arrest, summary judgment must be denied. Furthermore, since under McAllister's version of the events, he was also involved in the initial stop of Plaintiff, summary judgment should be denied with respect to him.

II. THERE ARE MATERIAL ISSUES OF FACT WITH RESPECT TO PLAINTIFF'S DENIAL OF FAIR TRIAL CLAIM

A denial of the right to a fair trial claim requires plaintiff to prove that: "an (1) investigating official (2) fabricates evidence (3) that is likely to influence a jury's decision, (4) forwards that information to prosecutors, and (5) the plaintiff suffers a deprivation of liberty as a result." Jovanovic v. City of New York (Jovanovic I), No. 10-4398, 2012 U.S. App. LEXIS 12521, at *4 (2d Cir. Jun. 20, 2012) (citing Jocks v. Tavernier, 316 F.3d 128, 138 (2d Cir. 2003); Ricciuti v. N.Y.C. Transit Auth. (Ricciuti I), 124 F.3d 123, 130 (2d Cir. 1997)). Probable cause is not a defense to the claim. Jovanovic I, 2012 U.S. App. LEXIS 12521, at *4.

Defendants first argue that there must have been a trial in order to claim a denial of fair trial. (Def.'s Memo, page 7). Contrary to Defendants' assertions however, it is now well-established that no actual trial is necessary for a denial of fair trial claim. See Ricciuti I, 124 F.3d 123 (denying summary judgment on denial of fair trial claim where charges were dismissed pre-trial); Villa v. City of New York, No. 11-CV-1669, 2013 U.S. Dist. LEXIS 49830, at *15-16 (S.D.N.Y. Mar. 14, 2013) ("a plaintiff may state a claim for denial of the fair trial right — even though no trial occurred"); Thomas v. City of New York, No. 11-CV-2219, 2013 U.S. Dist. LEXIS 47687, at *30-31 (S.D.N.Y. Mar. 31, 2013) ("Neither an actual trial being conducted nor a conviction is required to sustain a fair trial claim under § 1983"); Douglas v. City of New York, 595 F. Supp. 2d 333, 346 (S.D.N.Y. 2009) ("The Second Circuit has permitted a claim under § 1983 for violation of the right to a fair trial to proceed even where no trial took place.").

Defendant's next claim, based solely on Berman v. Turecki, is that a guilty plea is "a waiver of all the constitutional rights embodied in the right to a jury trial." (Def.'s Memo, p. 8). Berman v. Turecki, 885 F. Supp. 528, 533 (S.D.N.Y. 1995). The decision in Berman was based on the Supreme Court's decision in Heck v. Humphrey, 512 U.S. 477 (1994), which required a plaintiff to show that a prior criminal proceeding was terminated in his favor in order to bring a § 1983 suit. Berman, 885 F. Supp. at 532 (citing Heck, 512 U.S. 477). However, the Second Circuit has recently clarified how Heck applies to § 1983 suits by plaintiffs who pled guilty but are not currently incarcerated in Poventud v. City of New York, 715 F.3d 57 (2d Cir. 2013). In Poventud, the Court held that Heck's requirement that the criminal action be terminated in plaintiff's favor only applies if the plaintiff is currently in state custody. Poventud, 715 F.3d at 62. The court held that "a plaintiff alleging civil rights violations in connection with his conviction or imprisonment must have access to a federal remedy either under habeas or under § 1983," and that since the plaintiff was not in custody, his suit for denial of fair trial was not barred by Heck despite his guilty plea. Id. Here, plaintiff pled guilty to Criminal Possession of a controlled substance in the Seventh Degree; however, his denial of fair trial claim is not barred because he is no longer in custody. Id. See also Green v. Montgomery, 219 F.3d 52, 60 n.3 (2d Cir. 2000) ("We have held [...] that Heck acts only to bar § 1983 suits when the plaintiff has a habeas corpus remedy available to him (i.e., when he is in state custody). Because it does not appear that Green is presently in state custody, his § 1983 action is not barred by Heck.").

Defendants also claim, based entirely on Berman, that plaintiff is collaterally estopped from "challenging the validity of the arrest or prosecution." (Def. Memo, p. 8). However, in the Second Circuit, "a guilty plea in no way bars a section 1983 claim under principles of collateral estoppel, waiver, or mootness, where the alleged constitutional violations were not necessarily answered by the admission of guilt." Powers v. Coe, 728 F.2d 97, 102 (2d Cir. 1984). Here, the constitutional violations alleged, namely that defendants falsified information in the complaint report, are not answered by plaintiff's plea of guilty to misdemeanor criminal possession. In the criminal court complaint, plaintiff's top charge was a Class E felony, tampering with evidence, and was also charged with a class D felony, second degree assault, and resisting arrest and criminal possession in the seventh degree, both misdemeanors. (See Def.'s Ex. M). The fact that plaintiff pled guilty to the possession charge, a misdemeanor, is not a bar to plaintiff's claim that defendants falsely alleged that plaintiff tampered with evidence. As the tampering with evidence charge was dismissed, plaintiff did not have a full and fair opportunity to litigate this issue, and so collateral estoppel does not apply. See Haring v. Prosise, 462 U.S. 306, 320 (1983) ("when a court accepts a defendant's guilty plea, there is no adjudication whatsoever of any issues that may subsequently be the basis of a § 1983 claim.")

Defendants next argue that plaintiff's allegations of a fabrication are conclusory and fail to specify which official forwarded the false information. (Def.'s Memo, p. 8-9). Summary judgment must also be denied on this basis, because plaintiff has stated sufficient material facts regarding whether Defendants fabricated evidence and forwarded it to prosecutors. See Ricciuti I, 124 F.3d at 130. In the criminal court complaint, signed by Detective Campos, Campos alleges that he "saw two glassines of heroin in [Reyes]'s hand" and "observed [Reyes] place one of the glassines in [Reyes]'s mouth, and swallow." (See Def.'s Ex. M). Detective Campos also alleges that he "observed [Reyes] reach into his groin area, and remove a handful of glassines, placing them inside of [Reyes]'s mouth. (Def.'s Ex. M). However, all of these allegations are in dispute, as Plaintiff denies swallowing heroin both at the scene of the initial arrest and at the 25th precinct. (Reyes Dep. 112:24-113:9). In addition, the criminal court complaint alleges that

Detective Victor Cardona informed Campos that he "observed [Reyes] with phencyclidine." However, Detective Cardona admitted that he could not tell if plaintiff actually had PCP (Cardona Dep. 31:8-13), and no PCP (phencyclidine), marijuana or cigarettes were recovered. (Campos Dep. 35:20-21; 36:19-22; McAllister Dep. 17:12-17). Plaintiff also denies smoking marijuana or PCP on the date of the incident. (Reyes Dep. 47:3-4; 95:12-14; 124:7-12). Each of the above-noted inconsistencies creates material issues of fact as to whether Detectives Campos and/or Cardona fabricated evidence regarding their observations and forwarded it to prosecutors.

The cases cited by defendants that conclusory claims cannot support a denial of fair trial claim are distinguishable. In Abdul-Rahman, Johnson, and Abreu, the plaintiffs made only the most general claims of fabrication, and produced no evidence to support them. See Abdul-Rahman v. City of New York, No. 10-CV-2778, 2012 U.S. Dist. LEXIS 45653 (E.D.N.Y. Mar. 27, 2012); Johnson v. City of New York, No. 06-CV-630, 2010 WL 2771834, at *11 (E.D.N.Y. July 13, 2010) (granting motion for summary judgment where plaintiff made only general claims that the officers failed to divulge unspecified exculpatory information); Abreu v. City of New York, No. 04-CV-1721, 2006 WL 401651, at *6, 10 (E.D.N.Y. Feb. 22, 2006) (dismissing claim for denial of right to fair trial where plaintiff failed to produce any "credible evidence to support [his] inference" that officers fabricated evidence against him and then forwarded it to prosecutors). Here, as shown above, plaintiff has specifically alleged the evidence that was fabricated, namely that Detective Cardona did not observe plaintiff with PCP, and that Campos did not observe plaintiff swallow heroin. These allegations are supported with testimonial evidence. (See Reyes Dep. 112:24-113:9; Cardona Dep. 31:8-13).

Defendants next cite Carr v. City of New York, claiming that in the criminal court complaint, a "kernel of truth forecloses any malicious prosecution claim." Carr v. City of New

York, No. 11-CV-6982, 2013 U.S. Dist. LEXIS 57545 at *4 (S.D.N.Y. Apr. 19, 2013). While this may be true with respect to malicious prosecution, defendants cite no cases and make no real argument regarding whether the principle articulated in Carr should also apply to denial of fair trial claims.

Finally, defendants claim that plaintiff suffered no deprivation of liberty caused by the false information forwarded to prosecutors. Both cases that defendants cite on this point are clearly distinguishable from the case at bar. In Martin, cited by defendants, the Court stated the general principle that defendants in Section 1983 cases are liable for consequences caused by "reasonably foreseeable intervening forces." Martin v. City of New York, 793 F. Supp. 2d 583, 587 (E.D.N.Y. 2011) (citing Zahrey v. Coffey, 221 F.3d 342, 351 (2d Cir. 2000)). However, the court held that plaintiff's injuries were not foreseeable because they were the result of an intervening force, prison assault after he was already incarcerated. Id. The Martin court recognized that "plaintiff's *incarceration* at Rikers Island was a reasonably foreseeable consequence of his arrest." Id. Here, plaintiff's injury is his incarceration as a result of defendants' false statements, undoubtedly a foreseeable consequence of falsifying evidence in a criminal court complaint.

In Townes, also cited by defendants, the plaintiff sued officers based on an unreasonable search. Townes v. City of New York, 176 F.3d 138, 147 (2d Cir. 1999). The court held that the officers who conducted the search were not liable, because there was an intervening force that broke the chain of causation, namely the trial court's failure to suppress evidence in the criminal case. Id. However, the court held that while the "chain of causation between a police officer's unlawful arrest and a subsequent conviction and incarceration is broken by the intervening exercise of independent judgment," the rule only applies "in the absence of evidence that the police officer misled or pressured the official who could be expected to exercise independent judgment." Id. Here, the basis of plaintiff's claim is that defendants misled prosecutors by falsifying information in the criminal court complaint, so there is no similar break in the chain of causation. See Higazy v. Templeton, 505 F.3d 161, 177 (2d Cir. N.Y. 2007) ("a defendant cannot rely on the alleged existence of a superseding cause when that subsequent decision-maker has been deceived by the defendant's actions").

As defendants state in their memorandum, plaintiff's jail time was due to his inability to post bail. However, the judge's decision to set bail and the amount of bail set necessarily depends on the allegations in the criminal court complaint. Plaintiff alleges that defendants falsified information that was the basis for the top three charges—felony tampering with evidence, felony assault, and resisting arrest. The only charge that plaintiff admits to is the misdemeanor possession charge. Had the judge been presented with only a misdemeanor possession charge, it is likely that plaintiff could have been released on his own recognizance, or that bail would have been set at a lower amount, and he would not have been incarcerated. See Jovanovic I, 2012 U.S. App. LEXIS 12521 at *4 ("the allegedly fabricated admissions in Ricciuti caused the plaintiffs to be charged with a more serious crime and delayed their opportunity to be freed on bail.") (citing Ricciuti I, 124 F.3d at 130). Therefore, plaintiff's incarceration is a foreseeable consequence of making false statements in a criminal complaint, and there is no superseding cause that defendants can rely upon here to break the chain of causation.

Plaintiff has pled and raised issues of fact with respect to each element of his denial of fair trial claim, so summary judgment should be denied.

III. THE CLAIMS AGAINST THE CITY OF NEW YORK SHOULD NOT BE DISMISSED

A. Monell Claims

Defendants argue that plaintiff only alleges conclusory allegations of a policy, custom or practice, and cites Hayes v. Perotta, 751 F. Supp. 2d 597 (S.D.N.Y. 2010) for the proposition that a "custom or policy cannot be shown by pointing to a single instance of unconstitutional conduct by a mere employee of the [government]." (See Def.'s Memo, p. 13). However, as shown below, plaintiff's allegations here are supported by facts in the record, and adequately show a pattern of neglect and failure to discipline officers.

In order to establish that a municipality is liable in an action under section 1983 for unconstitutional acts by a municipal employee below the policymaking level, a plaintiff must show that the violation of his constitutional rights resulted from a municipal custom or policy. Monell v. New York City Dep't of Social Services, 436 U.S. 658, 694 (1978). However, a plaintiff is not required to show "that the municipality had an explicitly stated rule or regulation. Vann v. City of New York, 72 F.3d 1040, 1049 (2d Cir. 1995) (citing Villante v. Dep't of Corrections, 786 F.2d 516, 519 (2d Cir. 1986)). A plaintiff may establish a custom or policy "by showing that the municipality, alerted to the [alleged constitutional violation] by its police officers, exhibited deliberate indifference." Id.; see also Fiacco v. City of Rensselaer, 783 F.2d 319, 326-327 (2d Cir. 1986) ("[A municipality] should not take a laissez-faire attitude toward the violation by its peace officers of the very rights they are supposed to prevent others from violating.").

A plaintiff may show deliberate indifference by showing that a need for better training or supervision was obvious, Canton v. Harris, 489 U.S. 378, 390 (1989), which may be "demonstrated through proof of repeated complaints of civil rights violations," Vann, 72 F.3d at

1049; Ricciuti v. N. Y. City Transit Auth. (Ricciuti II), 941 F.2d 119, 123 (2d Cir. 1991). It is not required that plaintiff show that any or all of these complaints were found to be substantiated. See Fiacco, 783 F.2d at 328 ("whether or not the claims had validity, the very assertion of a number of such claims put the City on notice that there was a possibility that its police officers and used excessive force."). Deliberate indifference, in turn, may be "inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents." Vann, 72 F.3d at 1049; Ricciuti II, 941 F.2d at 123.

Deliberate indifference may be demonstrated if a plaintiff shows (1) that "a policy maker knows 'to a moral certainty' that her employees will confront a given situation"; (2) that "the situation either presents that employee with a difficult choice of the sort that training or supervision will make less difficult or there is a history of employees mishandling the situation" and (3) that "the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights." Walker v. City of New York, 974 F.2d 293, 297 (2d Cir. 1992).

Plaintiff has alleged that the defendant officers violated his constitutional rights by illegally detaining him prior to arrest, using excessive force and assaulting him while in custody, and creating and forwarding false evidence used to prosecute Plaintiff. The issue, therefore, is whether the City's training and disciplinary practices with respect to the defendant officers were sufficient to prevent the Defendant officers from making the wrong choice in these situations. See Walker, 974 F.2d at 299. Where it may seem "obvious" or "common sense" that a particular choice would constitute misconduct such that the City might reasonably assume that training or supervision is not required, deliberate indifference can still be shown where "there is a history of conduct rendering this assumption untenable." Id. at 300. In the instant case, the City knew of numerous claims naming the Defendant officers alleging similar misconduct, yet did not do enough in terms of training, discipline or other supervision to address these complaints and prevent future constitutional violations.

The defendant officers have numerous CCRB complaints against them, including claims of excessive force similar to this incident. Defendant Campos has a CCRB complaint dated December 26, 2006, alleging excessive force, including a chokehold. (See Defendants' CCRB Complaint Histories, Exhibit AA) Defendant Cardona has four CCRB complaints against him, including a charge of physical force from an incident on April 21, 2009, and an abuse charge from an incident on February 6, 2008. (Ex. AA). Defendant Mcallister has six charges against him, including abuse charges from January 15, 2011 alleging frisk and search of person. (Ex. AA). Defendant Talavera has ten total CCRB complaints, including an allegation of excessive force – chokehold on January 28, 2006 and an abusive search of person on August 25, 2007. (Ex. AA). Defendant Toro has a total of seven CCRB charges, including an allegation of physical force on April 23, 2005. (Ex. AA). Finally, Defendant Pascale has a total of nineteen charges against him, including ten allegations of physical force. (Ex. AA). [1]

Plaintiff submits that the City lacks a system to monitor Defendants in response to civil rights complaints against the Defendants. There is no evidence that the New York City Police Department did any investigation of the allegations in the CCRB complaints, or imposed meaningful discipline on the officers. None of the defendant officers recall being disciplined as a

[1] As noted above, several allegations in the CCRB complaint reports provided to Plaintiff were resolved by the CCRB as "unsubstantiated." It is important to note that "unsubstantiated," does not mean that the allegations were determined to be unfounded, but rather that the "the available evidence is insufficient to determine whether the officer did or did not commit misconduct." and is not a finding on the merits. See CCRB, Case Outcomes, available at http://www.nyc.gov/html/ccrb/html/investigations/outcomes.shtml; see also Vann, 72 F.3d at 1045 (describing testimony of expert witness explaining that "unsubstantiated" cases usually involve situations where there is "no neutral witness who could verify the version of either the officer or the civilian, and it was the word of the police officer against that of the civilian(s).")

result of CCRB force allegations.[2] (Cardona Dep. 14:20-15:5; Toro Dep. 72:20-73:5; McAllister Dep. 54:14-22; Abreu Dep. 9:4-16; Pascale Dep. 28:8-29:10; Talavera Dep. 10:10-13:13; Campos Dep. 8:15-9:1). If a complaint is made, through the CCRB, there are rarely consequences for the defendant officers, even if the CCRB substantiates a complaint.

In Vann, the Second Circuit reversed the district court's grant of summary judgment on municipal liability, holding that the plaintiff had presented sufficient evidence in the form of several complaints of excessive force against the defendant officer, and by showing that the City did nothing to supervise the defendant in the face of those complaints. Vann, 72 F.3d at 1050-51. Similarly, in Jeanty v. County of Orange, 379 F. Supp. 2d 533, 546-47 (S.D.N.Y. 2005), the Court found that the plaintiff had presented sufficient evidence to survive summary judgment on municipal liability in connection with an excessive force claim brought by an inmate at the Orange County Jail. The plaintiff had presented evidence of "several" previous incidents of excessive force in the jail, which the Court held presented "an issue of fact as to whether there is a history of officers mishandling situations such as the one at issue." Id. at 547.

In this case, numerous complaints have been made naming the defendant officers involving allegations similar to those in Plaintiff's complaint, including using excessive force in the course of an arrest. However, the defendant officers testified that they were never disciplined for these complaints. (Cardona Dep. 14:20-15:5; Toro Dep. 72:20-73:5; McAllister Dep. 54:14-22; Abreu Dep. 9:4-16; Pascale Dep. 28:8-29:10; Talavera Dep. 10:10-13:13; Campos Dep. 8:15-9:1). Based on the foregoing, Plaintiff submits that there are material issues of fact with respect to the City's failure to train, discipline and supervise the Defendants, such that summary judgment on Plaintiff's Monell claims should be denied.

[2] While it appears that Abreu did receive a command discipline for a substantiated CCRB complaint, he testified that he did not remember the basis for this command discipline.

B. *Respondeat Superior*

With respect to plaintiff's state law claims against defendant City of New York, defendants argue only that "there is no direct claim against the City sounding in state law." (Def.'s Memo, p. 14). However, the City can still be held liable under the theory of *respondeat superior*, as plaintiff claims that the defendant officers were acting within the scope of their employment during plaintiff's detention and subsequent prosecution. See Phelps v. City of New York, No. 04-CV-8570, 2006 U.S. Dist. LEXIS 42926, at *24-25 (S.D.N.Y. June 27, 2006). Defendants have not contended that the officers were acting outside the scope of their employment. Therefore, if plaintiff succeeds on his state law claims against any defendant officer, the City of New York may still be held liable regardless of how the Court decides Plaintiff's Monell claims. See Id. Furthermore, the City of New York is liable for the officer's actions under the theory of respondeat superior even if the individual officers are no longer parties to the action. See Shapiro v. Good Samaritan Regional Hosp. Med. Ctr., 55 A.D.3d 821, 823 (2d Dep't 2008) (employees "are not necessary parties to an action seeking to hold the [employer] vicariously liable for their alleged negligence on respondeat superior principles"); Trivedi v. Golub, 46 A.D.3d 542, 543 (2d Dep't 2007) ("In an action against an employer based upon the doctrine of respondeat superior, the employee allegedly committing the tortious conduct is not a necessary party"); Rock v. County of Suffolk, 212 A.D.2d 587, 587 (2d Dep't 1995) ("the two officers are not necessary parties to this action" against the County of Suffolk on the theory of respondeat superior).

IV. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

Qualified immunity does not rest in public officials when they "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pearson v.

Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). "Clearly established for purposes of qualified immunity means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Wilson v. Layne, 526 U.S. 603, 614-15 (1999) (quotations omitted) (citations omitted).

Defendants argue that Campos's statements to plaintiff prior to arrest cannot have constituted a seizure, stating that the inquiry is more benign than if he yelled "Stop, Police!" (See Def.'s Memo, p. 16). However, according to Campos, he did in fact say "Stop, Police!" (Campos Dep. 25:21-25, 26:1-16, 34:5-18). Defendants are correct that the verbal command alone would be insufficient to constitute a seizure, Cal. v. Hodari D., 499 U.S. 621 (1991), and that "[a]n order to stop must be obeyed or enforced physically to constitute a seizure." United States v. Swindle, 407 F.3d 562, 572 (2d Cir. 2005). Here, under defendant Campos' version of the events, the order to stop was obeyed, and therefore constituted a seizure. According to Campos, after he ordered Reyes to stop and identified himself, "[Reyes] did stop." (Campos Dep., 34:11-18; 26:1-27:10; 28:7-11). As discussed above, the verbal command of "Stop, Police," followed by plaintiff stopping, constitutes a seizure for Fourth Amendment purposes. See Ligon v. City of New York, 2013 U.S. Dist. LEXIS 22383, at *151-152 (S.D.N.Y. Feb. 14, 2013) (it is difficult to imagine many contexts in which an officer shouting [stop, police], followed by the person stopping, would not constitute a *Terry* stop); see also United States v. Simmons, 560 F.3d 98 (2d Cir. 2009) (holding that a stop took place where an officer twice ordered a person to "hold on a second," and after the second order the person stopped); Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 2000) (stop occurred where an officer pointing a spotlight at a person said, "What, are you stupid? Come here. I want to talk to you," and then told the person to show his hands). It was not objectively reasonable for defendant Campos to believe that his actions—under his version, stating "Stop, police, stop" to defendant—would not amount to a seizure under the Fourth Amendment. Therefore, defendants should not be granted qualified immunity on the seizure claim.

In addition, while defendants do not argue that they had reasonable suspicion to stop plaintiff, any reasonable suspicion articulated by defendants is based on disputed issues of fact. As discussed more fully above, Campos testified that he approached Reyes because he got a call over the radio from Cardona that an individual was smoking PCP. (Campos Dep. 24:2-12; 26:17-27:1). Detective Cardona however stated that he only saw plaintiff rolling a cigarette, but could not see what was inside or if plaintiff had any PCP. (Cardona Dep. 28:22-25; 29:17-20; 30:9-13; 31:8-13). Finally, plaintiff denies smoking marijuana or PCP that day, and no marijuana, PCP, or cigarette was recovered. (Reyes Dep. 47:3-4; 95:12-14; 124:7-12; Campos Dep. 35:20-21; 36:19-22; McAllister Dep. 17:12-17). Any alleged reasonable suspicion articulated by defendants is based on disputed issues of fact, so qualified immunity should be denied. See Bloom v. Luis, 198 F. Supp. 2d 141, 150 (D. Conn. 2002) (holding that defendant officer was not entitled to qualified immunity on a seizure claim, stating "the court cannot conclude, as a matter of law, that Officer Luis' actions were objectively reasonable because there are too many issues of fact in dispute"); see also McKelvie v. Cooper, 190 F.3d 58, 63 (2d Cir. 1999) ("Where [...] there are facts in dispute that are material to a determination of reasonableness, summary judgment on qualified immunity grounds is not appropriate")

With respect to the denial of fair trial claim, the right to a fair trial without fabricated evidence is "basic to our Constitution" and was clearly established in 2011. Jovanovic II, 2006 U.S. Dist. LEXIS 59165 at *38 (citing Zahrey, 221 F.3d 342) "Any reasonable officer would have known that Plaintiff's rights would be violated by fabricating evidence and making false statements to prosecutors." Id. at *39. Clearly, if Defendant Campos fabricated evidence or statements in the criminal court complaint, as plaintiff alleges, he would be knowingly violating the law, and therefore not entitled to qualified immunity. See Id. at *38-39. See also Ricciuti I, 124 F.3d at 130 (forwarding false information to prosecutors "violates an accused's clearly established constitutional rights, and no reasonably competent police officer could believe otherwise," so qualified immunity is unavailable).

V. WHETHER DEFENDANT ABREU WAS INVOLVED IN THE INCIDENT IS A DISPUTED ISSUE OF FACT.

Whether Abreu was personally involved in the arrest or strip search of Plaintiff at the precinct is a disputed issue of fact for a jury. Abreu testified that he was part of the team led by Sergeant McAllister on the date of the incident, and Detective Cardona was his partner on that day. (Abreu Dep. 23:12-19). Abreu testified that he does not recall whether he put any hands on Plaintiff. (Abreu Dep. 35:14-16). Abreu also testified that he went back to the precinct on the date of the incident, but does not remember anything specific about what he did when he got back to the precinct. (Abreu Dep. 39:6-16). Furthermore, Sergeant McAllister testified that Detective Abreu is on the team, and while he does not recall if Detective Abreu was present, "[h]e very well may have been." (McAllister Dep. 56:17-21). Detective Toro stated that he believes that Detective Abreu came into the cell where Plaintiff was being searched after Toro called for help. (Toro Dep. 36:21-25, 37:1-13). Detective Cardona testified that Detective Abreu went to the precinct with him after the arrest of Plaintiff. (Cardona Dep. 40:16-41:3). Detectives Talavera and Campos both testified that they could not recall if Abreu was in the cell during the strip search and subsequent incidents. (Talavera Dep. 36:8-9; Campos Dep. 51:18-19).

Plaintiff also alleges that defendant officers failed to intervene to prevent the violation of his right to be free from excessive force. (Def.'s Ex. A, ¶¶ 58, 72). If Abreu was present at the precinct, a disputed issue of fact, he can be held liable for failing to intervene even if he was not directly involved in the search. See Jean-Laurent v. Wilkinson, 540 F. Supp. 2d 501, 512 (S.D.N.Y 2008)

As demonstrated above, whether or not Detective Abreu was involved in the strip search of plaintiff or the subsequent struggle in the cell, or whether he was present at the precinct during the search are disputed issues of fact. As such, summary judgment is inappropriate.

VI. GML § 50-e DOES NOT REQUIRE INDIVIDUAL OFFICERS TO BE NAMED IN THE NOTICE OF CLAIM.

Defendants argue that plaintiff's state law claims against officers that were not named in the notice claim must be dismissed for noncompliance with GML § 50-e. However, as demonstrated more fully below, this argument is based on an anomalous decision from a trial court in Rensselaer County that is no longer followed by the Fourth Department. See Goodwin v. Pretorius, 105 A.D.3d 207 (4th Dep't 2013). As this line of cases is contrary to both the language of the statute and to the public policy supporting it, these cases should not be followed by this Court.

While the text of General Municipal Law § 50-e specifically requires the name of the claimant, it does not require the names of the employees against whom the claims are asserted. See N.Y. G.M.L. § 50-e (2013). § 50-e requires only that a notice of claim state "(1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim;

(3) the time when, the place where and the manner in which the claim arose."[3] There is no requirement that the name of the employees against whom the claims are asserted be named. In fact, GML § 50-e(1)(b) states that "[s]ervice of the notice of claim upon an officer, appointee or employee of a public corporation shall not be a condition precedent to the commencement of an action or special proceeding against such person." NY GML 50-e(1)(b).

The contents of a notice of claim are sufficient so long as it "includes information sufficient to enable the city to investigate," O'Brien v. City of Syracuse, 54 N.Y.2d 353, 358 (1981), and "nothing more may be required," Schwartz v. City of New York, 250 N.Y. 332, 335 (1929). When determining whether a claimant has complied with the statute, "courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time and understand the nature of the accident." Brown v. City of New York, 95 N.Y.2d 389, 393 (2000).

In Goodwin, the Fourth Department undertook an extensive analysis of the relatively recent "judicially created requirement" where some courts held that the notice of claim must name individual employees; the court rejected these decisions and held that GML § 50-e does not bar an action against individuals who were not named in the notice of claim. Goodwin, 105 A.D.3d at 216. The first time a court required individuals to name the individual employees in a notice of claim was in White v. Averill Park Cent. Sch. Dist., 195 Misc. 2d 409 (Sup. Ct., Rensselaer County 2003). As the Goodwin court noted, the decision in White was "devoid of any legal authority supporting the Justice's view that individual employees must be named in a notice of claim as a condition precedent to the commencement of an action against them." Goodwin,

[3] A notice of claim against a municipal corporation other than a city with a population of one million or more persons is also required to state the total damages to which the claimant deems himself entitled. See N.Y. G.M.L. § 50-e

105 A.D.3d at, 211. White was the only case cited by Tannenbaum v. City of New York, 30 A.D.3d 357 (1st Dep't 2006), in holding that the notice of claim required naming individual defendants. Since Tannenbaum, multiple trial court decisions, including decisions cited by Defendants here, have followed Tannenbaum and White. However, the Goodwin has held that this line of decisions is not to be followed because it is contrary to numerous decisions by the Court of Appeals which hold that the "test of the sufficiency of a Notice of Claim is merely whether it includes information sufficient to enable the [municipality] to investigate [. . .] Nothing more may be required." Goodwin, 105 A.D.3d at 216 (citing Brown, 95 N.Y.2d 389, 393; Rosenbaum v. City of New York, 8 N.Y.3d 1, 10-11 (2006); O'Brien, 54 N.Y.2d at 358). As such, the line of cases relying on White and Tannenbaum should not be followed by this Court as they are contrary to the intent of the statute and decisions of the New York Court of Appeals.

As required by GML § 50-e, Plaintiff's notice of claim included his name and address, the nature of the claim—excessive force and assault—and the time, place, and the manner in which the claim arose. (See Def.'s Ex. P). The notice of claim therefore complied with the statute and included "information sufficient to enable the city to investigate." Brown, 95 N.Y.2d at 393.

Plaintiff here also testified at a 50-h hearing conducted by the City of New York following his notice of claim. Courts in the Second Circuit have held that even when the individual defendants are not named, the notice of claim combined with the information provided at the 50-h hearing provides "sufficient information to satisfy the purpose of the notice of claim by enabling it to investigate, collect evidence, evaluate the merit of the claim, and assess the municipality's exposure to liability." Graham v. County of Erie, No. 11-CV-605S, 2012 U.S. Dist. LEXIS 76000 at *12 (W.D.N.Y. May 30, 2012). At plaintiff's 50-h hearing, he testified about the entire incident, including his arrest and the subsequent incident with the police during the strip search in a cell in the 25th precinct. As such, plaintiff has complied with GML § 50-e, and the Court should deny defendant's motion to dismiss the state law claims against parties not named in the notice of claim.

Finally, it should be noted that even if this court finds that the notice of claim requires individual officers to be named, which plaintiff vigorously opposes, the City of New York is still liable for the officer's actions under the theory of respondeat superior. See Shapiro, 55 A.D.3d at 823 (employees "are not necessary parties to an action seeking to hold the [employer] vicariously liable for their alleged negligence on respondeat superior principles"); Trivedi, 46 A.D.3d at 543 ("In an action against an employer based upon the doctrine of respondeat superior, the employee allegedly committing the tortious conduct is not a necessary party"); Rock, 212 A.D.2d at 587("the two officers are not necessary parties to this action" against the County of Suffolk on the theory of respondeat superior). Therefore, even if the Court were to require defendants' names in the notice of claim, the City is still a proper party and responsible to answer plaintiff's state law causes of action.

CONCLUSION

Defendants have failed to demonstrate their entitlement to judgment as a matter of law as their contentions are based on disputed material facts and/or are legally unsound.

Dated: Brooklyn, NY
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